

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33593

STATE OF IDAHO,)	2008 Unpublished Opinion No. 639
)	
Plaintiff-Respondent,)	Filed: September 11, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
ROBERT J. BURRIS,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, District Judge.

Judgment of conviction for conspiracy to traffic in methamphetamine and two counts of delivery of methamphetamine, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Robert J. Burris appeals from his judgment of conviction for conspiracy to traffic in methamphetamine by delivery and two counts of delivery of methamphetamine. He asserts that the district court erred by denying his motion to exclude certain trial evidence as a sanction for the prosecutor's late disclosure of the evidence and that the prosecutor engaged in misconduct during closing argument by indirectly commenting on Burris' choice not to testify at trial.

I.

BACKGROUND

In exchange for the State's agreement not to prosecute her and her brother on methamphetamine charges, Solitaire Lounsbury agreed to set up controlled buys with "high level" drug dealers. She arranged to buy an ounce of methamphetamine from Richard Shelden and Allison Bennett. On August 17, 2005, Lounsbury went to Shelden's and Bennett's residence

in Coeur d'Alene to complete the transaction. Officers arranged to monitor the buy, both visually and through audio transmission from a microphone hidden on Lounsbury's person. Five law enforcement officers, including Alcohol, Tobacco and Firearms Agent Jason Force, set up at locations near the residence for surveillance purposes. The law enforcement team took no photographs or video on this occasion.

The drugs were not at the residence when Lounsbury arrived, but Bennett received a phone call and directed the caller to the residence. A short time later a person called "Robbie" arrived with the methamphetamine, driving a silver van.¹ Robbie gave the drugs to Sheldon and Bennett, who in turn transferred the drugs to Lounsbury upon payment.² Robbie left in the van and was tailed by a surveillance vehicle, but the officers discontinued the surveillance to avoid detection. A short time later, other officers located the van and briefly spoke to its driver, who was identified as Virgil Burris, the defendant's brother. There were no passengers in the van.

Two days later, on August 19, 2005, Lounsbury completed another buy under substantially similar circumstances. This time, however, "Robbie" arrived in a different vehicle registered to Robert Burris. In addition, on this occasion the law enforcement team took photographs of the persons on the scene, including several photos of Robbie. After the August 19 buy, a detective showed Lounsbury a driver's license photograph of Burris, and she identified him as the man who had delivered the methamphetamine on both days. Burris was then charged with conspiracy to traffic in methamphetamine by delivery, Idaho Code §§ 37-2732B(a)(4), 18-1701, and two counts of delivery of methamphetamine, I.C. § 37-2732(a)(1)(A).

Trial was scheduled to begin on May 22, 2006. Because of the weight of the evidence establishing that he was the delivery man on August 19, Burris focused on defending against the August 17 delivery charge. Five weeks before trial he moved to exclude Lounsbury's identification of him as the August 17 deliverer on the grounds that the photo identification procedure, a one person "show up" photograph, had been unduly suggestive and that Lounsbury had smoked methamphetamine while at the residence on this occasion. The district court denied the motion.

¹ The van was not owned by any person involved in this case.

² Sheldon's nephew, Kelly, was also at the residence during the transaction.

As part of this same motion, Burris moved, with respect to the August 17 delivery, to “preclude the identification by any other police personnel or functionary because no other identification has been disclosed by the prosecution.” Burris gave the court the relevant information that he had been provided in discovery: three police reports, none of which referenced any law enforcement officer visually observing “Robbie” on August 17 from their surveillance positions. So far as the record discloses, three members of the August 17 law enforcement team, including Agent Force, did not write reports concerning their involvement and observations. The district court “reserved ruling on this evidentiary question” for trial.

Because of the concerns raised by defense counsel, a few days before trial the prosecutor arranged for a detective to ask Agent Force to identify Burris from a photo array as the individual who brought the drugs for the August 17 delivery. From a six-photo array, Agent Force picked Burris as the man who had delivered the drugs on that day. Four days before trial, the prosecutor revealed this information to defense counsel. Defense counsel had not previously been notified that any law enforcement personnel could identify Burris as the person making that delivery. At the outset of trial, Burris moved to preclude the prosecution from eliciting Force’s identification testimony and from admitting the photo array into evidence on the ground of a discovery violation. The district court denied the motion, finding no trial prejudice from the late disclosure.

In their trial testimony, both Force and Lounsbury identified Burris as the person who had delivered the drugs on the 17th. In addition, the photo array by which Force identified Burris was admitted into evidence. Burris elected not to testify at trial, and he called no witnesses. During closing argument, the prosecutor referred to the lack of evidence contradicting Force’s and Lounsbury’s identification of Burris as “Robbie.” Burris did not object to this portion of the prosecutor’s argument. The jury returned verdicts of guilty on all three charges. Burris appeals.

II.

ANALYSIS

A. Discovery Violation

Burris first asserts that the district court erred by denying his motion to exclude the photo lineup and Force’s testimony identifying Burris as the person who made the August 17 delivery

because all of this information was disclosed by the prosecutor to defense counsel only four days before trial.

Burris has not included in the record on appeal any written discovery requests that he may have made nor the State's responses. We note that it is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims of error on appeal. *State v. Murphy*, 133 Idaho 489, 491, 988 P.2d 715, 717 (Ct. App. 1999). Further, contrary to Burris' apparent assumption, there is no provision in the Idaho Rules of Criminal Procedure requiring the State to automatically disclose all "material information" to a defendant. Instead, the rules require the State to automatically disclose material or information "which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment therefor." Idaho Criminal Rule 16(a). The information at issue here does not tend to negate Burris' guilt; rather, it is inculpatory. Therefore, this Court could rest its decision on Burris' failure to show that the State was required to make any pretrial disclosure of information about Agent Force's ability to identify Burris.

On the other hand, a portion of the State's responsive argument is equally wanting. The State asserts that under I.C.R. 16(b), it was not obligated to disclose Agent Force's ability to identify Burris as the person who delivered the drugs on August 17 but only that he might be called as a witness, and that no discovery violation occurred because police reports that were produced to the defense disclosed that Force was one of the surveillance officers. The State cites as authority only the first sentence of I.C.R. 16(b)(6), but the subsection in its entirety provides:

(6) State witnesses. Upon written request of the defendant the prosecuting attorney shall furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any such person which is within the knowledge of the prosecuting attorney. *The prosecuting attorney shall also furnish upon written request the statements made by the prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney's agents or to any official involved in the investigatory process of the case unless a protective order is issued as provided in Rule 16(k).*

When this rule is thus viewed in the entirety, the State's argument is misleading and disingenuous, as the information at issue, if requested in discovery, would have to be produced under the highlighted portion of the rule. *See State v. Vondenkamp*, 141 Idaho 878, 884, 119 P.3d 653, 659 (Ct. App. 2005).

At the various hearings and motions on this matter in the trial court, the prosecutor never contended that Burris did not make a discovery request encompassing the information at issue. In addition, the prosecutor did not contend that Force's ability to identify Burris was unknown until four days before trial. Perhaps for these reasons, the district court did not address whether the disclosure was even required, but instead based its denial of Burris' motion on the absence of any showing of trial prejudice. In light of these circumstances, we will liberally construe the record and assume that Burris made the appropriate discovery request and that the information at issue should have been timely disclosed by the prosecution under Rule 16(b)(6).

Under Idaho law, a trial court may impose sanctions for discovery violations including, in appropriate circumstances, the severe sanction of exclusion of a witness or evidence. I.C.R. 16(e)(2); 16(j); *State v. Miller*, 133 Idaho 454, 456-57, 988 P.2d 680, 682-83 (1999); *State v. Harris*, 132 Idaho 843, 846-47, 979 P.2d 1201, 1204-05 (1999); *State v. Lamphere*, 130 Idaho 630, 633-34, 945 P.2d 1, 4-5 (1997); *State v. Stradley*, 127 Idaho 203, 206, 899 P.2d 416, 419 (1995); *Vondenkamp*, 141 Idaho at 884, 119 P.3d at 659; *State v. Albert*, 138 Idaho 284, 287-89, 62 P.3d 208, 211-13 (Ct. App. 2002); *State v. Winson*, 129 Idaho 298, 302-03, 923 P.2d 1005, 1009-10 (Ct. App. 1996). Whether to impose a sanction for a party's failure to comply with a discovery request, and the choice of an appropriate sanction, are within the discretion of the trial court. *State v. Buss*, 98 Idaho 173, 174, 560 P.2d 495, 496 (1977); *State v. Hawkins*, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998); *State v. Matthews*, 124 Idaho 806, 812, 864 P.2d 644, 650 (Ct. App. 1993). Where evidence has been admitted at trial despite the defendant's objection that it was not timely disclosed, we will not reverse in the absence of a showing that the delayed disclosure prejudiced the defendant's preparation or presentation of his defense. *State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999); *State v. Pizzuto*, 119 Idaho 742, 751, 810 P.2d 680, 689 (1991), *overruled on other grounds by* *State v. Card*, 121 Idaho 425, 432, 825 P.2d 1081, 1088 (1991); *State v. Johnson*, 132 Idaho 726, 728, 979 P.2d 128, 130 (Ct. App. 1999). The district court here elected not to exclude the evidence, and no other alternative sanction was requested. Therefore, the question on appeal is whether Burris was so prejudiced by the State's alleged discovery violation that the trial court's refusal to exclude the evidence as a sanction constituted an abuse of discretion.

In *State v. Allen*, 145 Idaho 183, 185-86, 177 P.3d 397, 399-400 (Ct. App. 2008), this Court stated:

The prejudice to be considered is impairment of the defendant's ability to defend himself at trial caused by the untimeliness of the disclosure of witnesses or evidence. Our appellate courts have often said that, when an issue of late disclosure of prosecution evidence is presented, "the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense *that he was prevented from receiving his constitutionally guaranteed fair trial.*" *Byington*, 132 Idaho at 592, 977 P.2d at 206 (emphasis added); *State v. Smoot*, 99 Idaho 855, 858-59, 590 P.2d 1001, 1004-05 (1978); *State v. Pacheco*, 134 Idaho 367, 370, 2 P.3d 752, 755 (Ct. App. 2000); *Johnson*, 132 Idaho at 728, 979 P.2d at 130; *Hawkins*, 131 Idaho at 405, 958 P.2d at 31; *State v. Hansen*, 108 Idaho 902, 904, 702 P.2d 1362, 1364 (Ct. App. 1985). This ordinarily requires that the complaining party demonstrate that the late disclosure hampered his ability to meet the evidence at trial, *State v. Miller*, 133 Idaho 454, 456-57, 988 P.2d 680, 682-83 (1999); *State v. Pizzuto*, 119 Idaho 742, 751, 810 P.2d 680, 689 (1991); *State v. Crook*, 98 Idaho 383, 386, 565 P.2d 576, 579 (1977); *State v. Griffith*, 94 Idaho 76, 81, 481 P.2d 34, 39 (1971); *State v. Coburn*, 82 Idaho 437, 444, 354 P.2d 751, 755 (1960), had a deleterious effect on his trial strategy, *United States v. Marshall*, 132 F.3d 63, 68, (D.C. Cir. 1998); *United States v. Camargo-Vergara*, 57 F.3d 993, 999 (11th Cir. 1995); *United States v. Lanoue*, 71 F.3d 966, 976-78 (1st Cir. 1995), *abrogated on other grounds by United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. Noe*, 821 F.2d 604, 607-08 (11th Cir. 1987), or that it deprived him of the opportunity to raise a valid challenge to the admissibility of evidence. *Camargo-Vergara*, 57 F.3d at 999.

Here, the record shows no trial prejudice. Burris makes no argument that the late disclosure hampered his ability to meet Force's identification testimony, deprived him of the opportunity to raise a valid challenge to the admissibility of this evidence, or had a deleterious effect on trial strategy. Instead, he asserts that his defense regarding the August 17 delivery--that the State could not prove his identity as the person who delivered the drugs--was weakened because of Force's testimony. However, this asserted prejudice is caused by Agent Force's ability to identify Burris, not by the late disclosure of that ability. Burris has identified nothing more that he could have done at trial to prevent, rebut or counter Force's identification testimony if Force's ability to identify Burris had been disclosed in an earlier discovery response. In order to be entitled to relief on an appeal, Burris must show prejudice from the lateness of the disclosure, not from the mere existence of the evidence. Therefore there was no reversible error in the district court's decision to allow Force's testimony and to allow the admission of the photo array.

B. Prosecutorial Misconduct in Closing Argument

Burris elected not to testify at trial and he called no witnesses. During closing argument, the prosecutor stated:

But think of it like this. There is nothing to contradict the testimony from Miss Lounsbury that it was Mr. Burris there on the 17th. There is no evidence of contradictory testimony. Furthermore, there's no evidence to contradict Agent Force's testimony that he was the one who was driving the van as it left immediately after the purchase. Nobody contradicts that testimony.

....

So you don't have anything to contradict the fact that he was there in the room on the 17th and that he was driving the van.

Burris did not object to this argument. On appeal, however, he asserts that the prosecutor engaged in misconduct because his argument necessarily must be taken as a comment on Burris' choice not to testify in his defense.

As we discussed in *State v. McMurry*, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006), it is impermissible for a prosecutor to comment on a criminal defendant's decision not to testify at trial:

The Fifth Amendment guarantees "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" U.S. CONST. amend. V. A prosecutor may not therefore introduce evidence of the defendant's pre-arrest silence during a "custodial interrogation" or post-arrest silence for the purpose of inferring admission of guilt. *Miranda v. Arizona*, 384 U.S. 436, 467-68, 86 S.Ct. 1602, 1624-25, 16 L.Ed.2d 694, 719-20 (1966); *State v. Hodges*, 105 Idaho 588, 591, 671 P.2d 1051, 1054 (1983); *State v. White*, 97 Idaho 708, 714-15, 551 P.2d 1344, 1350-51 (1976). Similarly, neither a prosecutor nor a trial judge may comment to the jury on a defendant's failure to testify at trial. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

The rule set forth in *Griffin* applies to direct and indirect comments on the failure to testify. *Hodges*, 105 Idaho at 592, 671 P.2d at 1055 (citing *People v. Jackson*, 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 (1980)). In *Hodges*, Idaho's highest court noted that the rule proscribing comment on a defendant's failure to testify "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." *Id.* Where the state's expert testified that the substance possessed by Hodges was cocaine and the prosecutor remarked that such evidence was uncontradicted, there simply was no implication that Hodges was obligated to take the witness stand in order to avoid an inference of guilt. *Id.* at 591-92, 671 P.2d at 1054-55. In this vein, Idaho follows the overwhelming number of jurisdictions holding that a prosecutor's general references to uncontradicted evidence do not necessarily reflect on the defendant's failure to testify, *where witnesses other than the defendant* could have contradicted the evidence. *See, e.g., Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir.1987); *Raper v. Mintzes*, 706

F.2d 161, 164 (6th Cir.1983). Even so, prosecutorial comments on the lack of contradicting defense evidence may necessarily result in an indirect *Griffin* violation depending on the number and nature of those comments. *See id.* Courts uniformly condemn this prosecutorial tactic due to the difficulty of determining whether *Griffin* violations are constitutionally harmless. *See, e.g., United States v. Castillo*, 866 F.2d 1071, 1084 (9th Cir.1989).

Id. at 314-15, 143 P.3d at 402-03.

Burris did not object the prosecutor's comments. If a defendant fails to preserve an issue for appeal by a timely objection, the issue will be reviewed on appeal only if fundamental error has occurred. *State v. Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007); *State v. Perry*, 144 Idaho 665, 668, 168 P.3d 49, 52 (Ct. App. 2007). The Idaho Supreme Court has defined fundamental error as follows:

Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.

State v. Christiansen, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). In *Christiansen*, the court recognized that it has also utilized other definitions of fundamental error:

At other times, we have defined fundamental error as "[a]n error that goes to the foundation or basis of a defendant's rights," *State v. Kenner*, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1992), and "error which 'so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process,'" *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003) (quoting *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)).

Christiansen, 144 Idaho at 470, 163 P.3d at 1182.

A direct and explicit trial reference to a defendant's exercise of his right to remain silent in order to infer guilt has been held to constitute fundamental error that may be reviewed in the absence of an objection in the trial court. *State v. Strouse*, 133 Idaho 709, 711-14, 992 P.2d 158, 160-63 (1999)³; *State v. Dougherty*, 142 Idaho 1, 4, 121 P.3d 416, 419 (Ct. App. 2005); *State v. Kerchusky*, 138 Idaho 671, 677-78, 67 P.3d 1283, 1289-90 (Ct. App. 2003); *State v. Martinez*, 128 Idaho 104, 111, 910 P.2d 776, 783 (Ct. App. 1995). However, no such explicit reference

³ The *Strouse* opinion does not mention that it is applying the fundamental error doctrine, but the opinion is clear that "[d]efense counsel made no objection." *Strouse*, 133 Idaho at 710, 992 P.2d at 159.

was made here. The prosecutor made, at most, an indirect remark that could be interpreted as a comment on Burris' failure to testify. As noted by the State, even this conclusion is questionable because witnesses other than Burris could have been called by the defense to contradict Lounsbury's and Force's identification testimony. These persons include Sheldon, Bennett, and Sheldon's nephew, Kelly, all of whom were at the residence on August 17. In addition, Burris' brother Virgil could have testified concerning whether Burris was driving the van at the time in question. Given this array of potential witnesses, the prosecutor's argument was not so clearly a comment on Burris' silence as to amount to fundamental error.

III.

CONCLUSION

The judgment of conviction is affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**